

Service Date: June 20, 1990

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of Burlington Northern Railroad)	
Company for Discontinuance of its)	DOCKET NO. T-9293
Agency Operations at Harlem,)	
Montana.)	ORDER NO. 5917a

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Charles C. Dearden, Murphy, Robinson, Heckathorn & Phillips, P.C., P.O. Box 759,
Kalispell, Montana 59903

FOR THE COMMISSION:

Garth Jacobson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner and Hearing Examiner

Pursuant to 2-4-621, MCA, a proposed order authorizing a grant of the authority requested was issued in this matter on February 27, 1990. No exceptions, briefs or requests for oral argument have been received. Therefore, the Commission adopts the proposed order as its final order in this matter.

BACKGROUND

On August 19, 1988 Burlington Northern Railroad Company (BN) applied to the Montana Public Service Commission (Commission) for authority to discontinue its agency and dispose of the depot facilities at Harlem, Montana.

After proper notice a public hearing was held on October 18, 1988, at the City Council Chambers, Harlem, Montana.

Following the hearing, parties were given the opportunity in this docket and Docket Nos. T-9162 and T-9294, to brief issues of whether safety is a factor of public convenience and necessity and whether farmers not directly involved in shipping are shippers. Briefs were duly submitted by the attorney for Liberty County in Docket No. T-9162, and the attorney for BN, regarding Docket Nos. T-9162 and T-9294.

SUMMARY OF TESTIMONY

Testimony of Applicant

Brian Aman, Donald G. Boesplufg, William Allbright and James T. Whittmyer testified for BN.

Brian Aman, the assistant manager of data quality for BN in Seattle, Washington, oversees agency and yard office services for the Seattle region and conducts station audits. Harlem is in the Seattle Region. He has worked for BN for nine years.

Mr. Aman testified on the role of a central agency, or Central Billing Center (CBC), in handling shipping in the present organization of BN. The customer initiates the shipping procedure by calling the central agency and placing a car order, i.e., stating what car type is needed, when and where (s)he wants the car (spotted), what commodity will be shipped, and if possible, the destination of the loaded car. The information is logged in the car order book on file and electronically transmitted to the car distribution office (for this area, Seattle, Washington) which forwards the cars through a train or series of trains through a tagging system to the destination. The cars have a SPINS number and destination (assigned to a customer) which indicates to the crew where to spot the car(s). The car distribution office in Seattle has full control of distribution, which is all done on computers. The CBC (in this area, located in Great Falls), a central agency, handles waybill and other agency functions previously handled by the local agents. The CBC, open 24 hours a day, is run by people using a computer. The CBC also handles demurrage, the penalty assessed by tariff for keeping a car beyond 24 hours for loading. After the train crew spots the car(s), it notes the time and date on the wheel report which is forwarded to the CBC at the conclusion of its tour of duty. CBC will then notify the customer once the car is spotted for loading. The customer after loading the car may telephone, send by facsimile, or mail the bill of lading to the CBC. BN provides that the shipper may have power of attorney for the railroad and sign the bill of lading as agent for BN. The waybill produced from information on the bill of lading is entered into a computer and produces the paper documents which generate the freight bill. Any CBC can trace cars with the waybill information in the computer system. If a shipper has a problem, (s)he will call the CBC, according to Mr. Aman. CBC will either handle the problem directly or refer the problem to appropriate personnel, including the trainmaster who is available 24 hours a day. Mr. Aman also testified that when a customer receives a shipment by rail it is similarly processed through the CBC.

Mr. Aman testified that BN contacted the shippers named in the application and there were no objections from the following shippers and their representatives expressed before hearing.

Bureau of Indian Affairs	Samuel Nitterville	Belknap
Equity Coop Association	Gust Aipperspach	Harlem
Montana Merchandising	Randy Kinzel	Harlem
Montana Merchandising	Gary Johnson	Great Falls
Meissner Tractor (Big Bud)	Mr. Harmon	Havre

Mr. Aman testified that the present agent at Harlem is a protected employee.

With way billing and agency functions moved to CBC, Mr. Aman testified that CBC handles all agency duties. The agent has no specific agency responsibilities. BN's employees are expected to be responsive to the customers' needs, regardless of their position. When the customer contacts the local agent, he is obligated to help in any way he can. More than likely, he will respond by calling the CBC for the necessary information.

If the agency were cancelled, Mr. Aman testified that the facility would remain for a maintenance station.

Mr. Aman testified that the train crews do not inform the local agent when cars are spotted.

Under questioning by the Commission, Mr. Aman testified that BN wants and intends to serve all its customers, whether those requiring 52 car facilities or the less than unit train shippers such as Equity Coop. He testified that everyone has to be dealt with individually according to need. BN wants to see its shippers satisfied. BN will not prevent the agent from meeting the shippers' needs as long as the agency is present.

Donald G. Boesplufg, trainmaster/road foreman between Havre and Glasgow, Montana, supervises train operating crews. He testified that he sees that the crews operate according to their schedules. The crew when leaving Havre is provided a wheel report which indicates a shipper destination of each car. The crew's responsibility is to spot the car in the proper position at the destination. The crews have track diagrams, and are generally local crews familiar with the territory. Mr. Boesplufg testified that he is available 24 hours a day. Prior to BN's witnesses, Mr. Gust Aipperspach, manager of Equity Coop, testified about problems which the local agent had resolved (See Finding Nos. 23-26 herein). Mr. Boesplufg said that if Mr. Aipperspach has problems with improperly spotted cars, he should call CBC which would contact the trainmaster. The shipper's meter does not begin to run until after the cars are correctly spotted. Mr. Boesplufg testified that he does not receive many complaints for incorrectly spotted cars.

Mr. Boesplufg also testified that the situation of the blue-hot train wheel would be highly unlikely today with hot box detectors east of Chinook and Harlem (See Finding No. 27). These detectors detect dragging equipment. They also have temperature sensors on both sides which can detect any ball bearing in the axles when it starts to get warm. The boxes are connected to a computer which has a computer voice that states which axle is heating up and how far back it is on the train. BN's operating rules dictate that the train crew shall immediately stop and inspect the car. The right-of-way crews and others working on the tracks are required to do roll-by inspections.

Mr. Boesplufg testified that BN provides four-day local service Monday through Thursday. Friday through Sunday a through train can set cars out, if ordered.

Mr. Boesplufg testified that on problems with delays and errors in getting cars properly spotted, upon receiving notice he should be able to get a train crew to handle the matter

within a few hours. Mr. Gust Aipperspach, manager of Equity Coop, had testified before BN presented its case that he had problems with BN's misspotting cars which the local agent resolved. (Finding Nos. 23 - 26). Mr. Boepsflug testified that Mr. Aipperspach never got in touch with anyone who got in touch with him and that the problem would not normally occur.

Mr. William T. Allbright, senior cost analyst with BN, is responsible for collecting and compiling revenues, carloads and expense data for hearings such as this. He prepared and testified on Exhibit A, a report compiling accounting information. Mr. Allbright testified that in 1985, 705 cars were forwarded from Harlem (primarily wheat) and 10 were received for a total of 715 cars. In 1986, 607 cars of wheat, 128 cars of barley and 7 by-products of liquor cars were forwarded for a total of 742, while 35 cars were received for a total of 777 cars. In 1987, there were 1,154 cars forwarded (primarily wheat) and 6 cars received for a total of 1,160 cars. There were 596 cars forwarded and 5 cars received, for a total of 601 cars in the first six months of 1988. Mr. Allbright testified that the preponderance of traffic related to grain shipments was unit trains rather than individual cars.

Mr. Allbright testified that BN has 190 agents system-wide in 25 states and 2 Canadian provinces as of the date of the hearing. There were 37 agents in Montana, while Nebraska had 16 agents, Washington had 9 agents, North Dakota had 6 agents, Colorado had 7 agents, Wyoming had 6 agents, Minnesota had 12 agents and Texas had 19 agents.

Mr. Allbright testified that operations were profitable at Harlem, both under the Belt/Carter and Burlington Northern formulas. Net revenues were as follows:

\$355,550 for 1985
\$211,357 for 1986
\$379,362 for 1987
\$218,327 for the first half of 1988

Mr. Albright further testified that if the agency duties were actually left at Harlem, which are now at CBC, then the agent would work a total of 1 hour per year in received cars, 10 hours per year in cars forwarded and 128 hours in work related to individual cars. The agent's duties related to other station work such as janitorial would amount to 250 hours. The total time required for agency work would be 389 hours, including the time actually done by CBC, or 19 percent of the agent's 2,000 yearly hours, if the agent actually did agency duties. Mr. Albright admitted that the time study on agency work was based upon normal routine duties. Mr. Albright stated that the centralized agency performs the agency functions more efficiently.

James D. Whittmyer, BN's supervisor in charge of the CBC since its inception in 1983, testified that there are four clerks on the 7:00 a.m. to 3:00 a.m. shift, three on the 3:00 p.m. to 11:00 p.m. shift and one on the night shift. Mr. Whittmyer stated that BN holds area meetings for customers every six months to discuss complaints and problems. In response to prior public testimony, he testified that they have never had the complaint that a shipper has called the CBC with a question and never received a return call (See Finding No. 23 herein). He stated that on his return to Great Falls he would speak with the CBC clerks and put out written instructions on return calls. He admitted to receiving complaints on spotting of cars. CBC contacts the trainmaster and has the train crew correct a general spotting problem. Occasionally a problem will persist, but eventually it is corrected.

Mr. Allbright testified that there is little turnover of the staff at the centralized agency and that the agents at CBC are familiar with small operations such as Farmers Equity Coop. He stated that BN is aware of problems and has been able to handle problems.

Public Testimony

Mr. Gust Aipperspach, manager of Equity Co-operative Association (Equity), a local independent with an elevator in Harlem, testified prior to Applicant's witnesses. He has been in the elevator business 32 years. Mr. Aipperspach was concerned about service from CBC. Whenever he called Great Falls he received no response or return calls with information. However, when Equity calls the local agent, he can get the answers quickly. On orders out of Great Falls, cars are misspotted half a mile out of town where they cannot be loaded or unloaded. On occasion, cars intended for Equity's largest competitor are mixed up with cars intended for Equity. He has had to get the local agent to straighten out the matter. The agent's phone call often quickly corrects these errors, when he gets no response from the CBC. On other occasions Equity's competitor, Montana Merchandizing, has moved and respotted cars at Equity's request, a burden to have to make the request. His competitor has a 52 car facility, while he has to bring in fewer cars at a time. With the local agent he knows where the cars are, when the cars will arrive, and when he should notify his customers to bring in their grain. Because of Equity's lack of capacity, it requires the presence of the local agent to coordinate these efforts. The agent also enables him to avoid demurrage.

Mr. Aipperspach testified that, as a small shipper, Equity needs the agent at Harlem, or between Harlem and Chinook, in order to run the coop. Although he ships on over 140 cars per

year (number to increase), he cannot store five cars. He has a very limited storage capacity and absolutely relies upon the assistance of the local agent.

Upon cross-examination, Mr. Aipperspach testified that he spoke with BN about these concerns a couple of months before, yet one or two incidents have occurred since BN promised better service. The CBC inexplicably told him that it could not check on car placement until Thursday. He testified that he only received one return call from CBC in eight months to let him know car locations. When he notifies the agent he gets an answer in an hour. When he calls CBC, he is told to call Havre for cars and Havre has different information than the CBC. Therefore, he relies upon the local agent.

Mr. Aipperspach testified that Equity ships grain and receives fertilizer. He used about 140 cars in 1987 and hoped to double the amount. He testified that the CBC had satisfactorily taken care of the billing. The local agent, however, is more dependable on getting the cars expeditiously and assisting in avoiding demurrage.

Will Stuart, a farmer and trucker from Harlem, testified that he was concerned about safety. The agent inspects the trains that go by. Six or seven years before, Mr. Stuart saw a train go by with a blue wheel that was hot. He testified that the crossing arms are a constant problem, but the agent can call in someone from Chinook to fix them. Otherwise, no one takes responsibility. Mr. Stuart testified that the major reason the agent should remain is for safety, i.e., roll-by inspections.

Wesley Maddox, a farmer who lives just east of Chinook, testified that loss of local contact will result in the shippers doing the spotting of cars and working for the railroad, instead of the railroad working for the shipper. Mr. Maddox hauls his grain to shippers who ship it.

Dave Boisvert, mayor of Harlem, testified that the crossing arms have been a constant problem for the city. A couple of months before, for example, the arms were down and traffic could not proceed for 4-6 hours. This occurred at a time the agent was not available and BN's superintendent, Pat Keim, was gone. Mr. Boisvert also testified that trains sit on the crossing for 45 minutes. Mr. Boisvert was concerned that the loss of the local agent would leave the small town vulnerable in dealing with BN.

State Senator Greg Jergeson from Chinook testified that those members of small communities already feel isolated, and BN's petitions to close the local agencies make them feel out of contact with BN's operation. He testified that as a local businessman he was concerned about BN consolidating regionally, leaving the local communities to deal with an "800" number. Senator Jergeson testified that he raises grain and moves it to market through local elevators, to that extent being a shipper. He has not personally contracted with the railroad to ship grain. His grain is marketed by contract before he delivers his grain. His grain is primarily delivered to MMI in Chinook, with other options to go to Harlem or Havre to take care of the unit train rates.

Arthur Kleinjan, chairman of the board of Blaine County Commissioners, testified in support of keeping the agency open. He testified that the county fought approximately 40 BN caused fires the previous year. The agent provides a service in watching the trains and possibly preventing some fires.

State Representative Francis Bardanouve, on the board of Equity Coop in Harlem, testified in favor of keeping the agency open. He testified that he talks daily with the manager of the coop and is aware of problems. He testified that BN has substantially reduced employment, and yet

freight rates have not gone down. He doubts that removing this agency would lower the rates. Representative Bardanouve testified that BN's concern is solely how much profit it can make it in Montana and that it has no interest in Montanans. Representative Bardanouve testified to this concern that BN's new business policy was taking the profitable part of its operation and placing it in a separate corporation, while keeping BN's liabilities with the railroad.

Testimony from Union Representatives

Mr. James T. Mular, representing the Transportation and Communications Union, and Mr. Ray West, assistant state legislative director of the United Transportation Union, testified at the Chinook hearing in Docket No. T-9294 on the afternoon of October 18, 1988. At the request of Mr. Mular in this Docket No. T-9293, the later testimony of Mr. Mular and Mr. West was incorporated into the record to the degree it was appropriate and relevant. Mr. Mular asked that this testimony be incorporated by reference into the Harlem proceedings as relates to safety and the public convenience and necessity.

At Chinook, Mr. Mular testified in opposition to the closure of both the Harlem and the Chinook agencies. Mr. Mular testified that public convenience and necessity applied to safety standards and other requirements over which the Commission has jurisdiction in the public interest and that the railroad had presented a case of carrier convenience and necessity. Mr. Mular testified that BN had already closed the agencies because the agents were not allowed to perform agency duties. BN took away these duties in 1984 and 1985 without permission, Mr. Mular testified. Mr. Mular asserted that shippers were not the only witnesses to attest to whether an agency is required

by public convenience and necessity, and that the Commission should consider safety factors and BN's compliance with Commission rules in determining whether to allow an agency closure.

At Chinook, Mr. Ray West testified on behalf of the train crews. He testified that the agent provides an important function for train crews in conducting roll-by inspections, especially since there are no longer cabooses. The agent has radio communication, the only way the train may be contacted. Mr. West testified that BN wants to replace the agent with a toll-free number, but the agent is still very important in checking the train and relaying messages. The agent can reach the dispatcher at times when the train crews cannot. On one occasion, if there had not been an agent at Harlem a train fire would have been long gone. An agent's expeditious reporting of fires is important, Mr. West testified.

DISCUSSION, FURTHER FINDINGS AND ANALYSIS

Under < 69-14-202(2), MCA, the Commission shall authorize the closure, consolidation or centralization of a facility if a railroad demonstrates to the Commission that the facility is not required for public convenience and necessity. At the time of this application when the facility at issue was for the purposes of shipping, the Commission's test for determining public convenience and necessity involved a threshold determination of whether the railroad had a duty to maintain and furnish shipping facilities under < 69-14-202(1), MCA.

69-14-202. Duty to furnish shipping and passenger facilities. (1)
Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

Upon the railroad's application to close an agency, the Commission had an obligation to weigh the needs of the shipping public for rail service against the railroad's burden of maintaining agency service, following a public hearing. §69-2-202(2), MCA.

The 1989 Legislature modified § 69-14-202(2), MCA, by adding the following language:

In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

Since the legislature does not engage in idle acts, the Commission interprets this amendment to reflect the intention of the legislature to expand Commission analysis to include impacts of the proposed closure upon persons other than shippers. A review of the legislative history of this amendment supports such an interpretation.

The Commission determines that there are two tests to apply in determining whether an agency may be closed under § 69-14-202(2), MCA:

1. the narrower test (pre-1989 legislature) which requires a railroad to demonstrate that an agency is not required for the convenience and necessity of the shipping public;
and
2. the broader test (per 1989 amendment) which requires the Commission to consider, in addition to testimony on shipping, any other facts and testimony related to burdens to the general public if the application were granted to close the agency.

However, the Commission need not determine in this proceeding which test should be applicable. Application of the narrower test (pre-1989 legislature) demonstrates that public convenience and necessity require the agency at Harlem to remain open. The general public's concerns, therefore, need not be considered for a determination. However, application of the broader test (per 1989 amendment) merely reinforces this determination. Testimony of the general public discussed the importance of the local agent in matters regarding safety and convenience, including right-of-way fires and railroad crossings.

Using the Belt/Carter formula, approved by this Commission as a fair measure of agency profitability, the agency at Harlem is profitable. In approving applications to close profitable stations in the past, the Commission has noted that shipper testimony in such cases will be accorded great weight.

Public convenience and necessity is not an absolute standard that can be determined by a formula. It must be determined by the facts and circumstances of each case. Under the pre-1989 test, the Commission must weigh the needs of the shippers served by the railroad against the railroad company's burden of maintaining agency service.

According to Mr. Aman, before the hearing the railroad contacted its known shipping customers in Harlem and no one expressed objections to closure of this agency. At the hearing Gust Aipperspach, manager of Equity Co-op, testified about Equity's concerns about service from the centralized agency and objected to loss of the local agency. Equity is a relatively major shipper for the area, shipping about 140 carloads in the year preceding the hearing. Mr. Aipperspach anticipated perhaps doubling his business with BN. However, Equity has limited storage space for both cars and grain and must coordinate the arrival of cars with the arrival of grain to ship. The manager himself

loads the grain. He could not conveniently manage the daily operations of shipping without the local agent. Given Equity's lack of storage and other facilities, Mr. Aipperspach needs the presence of the agent locally to keep him informed of car delivery times, assist with car spotting problems, and provide other services. He has made a compelling case for keeping this agency open.

The testimony of the Protestant shipper establishes a genuine shipper need for a local agency and personalized service at Harlem. This need transcends community economic concerns, shipper resistance to change, and mere preference. While BN's testimony would limit the agent's duties to those waybilling functions it has transferred to the CBC, the Commission declines to define and limit the role of the local agent. It is apparent that the local agent provides services essential to Equity's shipping operation. Despite BN's policy concerning the duties of an agency, the testimony of this shipper demonstrates that a member of the shipping public needs local assistance. This demonstration rises to the level of public convenience and necessity required to keep the agency open.

CONCLUSIONS OF LAW

1. The Public Service Commission has jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 14, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter as required by Title 2, Chapter 4, MCA.
3. No specific rule can be used to determine whether public convenience and necessity requires a given service to be performed. The facts in each case must be separately considered. See Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Board of Railroad Commissioners, 225 P.2d

346 (Mont. 1953), cert. den. 346 U.S. 823. The Commission concludes that the public convenience and necessity do not permit the elimination of agency service at Harlem, Montana.

ORDER

NOW THEREFORE IT IS ORDERED that Burlington Northern Railroad Company's application in Docket No. T-9293 to close the agency at Harlem, Montana and dispose of the depot facilities is Denied.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this docket that were not ruled on are Denied.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

DONE AND DATED this 18th day of June, 1990 by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.